K BALASUBRAMANIAM

v.

MBF FINANCE BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[APPEAL NO: W-02-17-1994]
19 MAY 2003

COMPANY LAW: *Winding-up - Liquidator - Recovery of property - Movable asset under debenture - Recovery from receiver and manager appointed by debenture holder - Whether liquidator entitled to asset - Whether could only exercise right of redemption - Companies Act 1965, ss. 233(1), 277(5)*

The appellant was appointed a liquidator of Kosmopolitan Credit & Leasing Sdn Bhd ('KCL'), following the liquidation of the company. Subsequently, the appellant applied for and obtained, *ex parte*, an acquiring order against the receiver and manager of KCL ('R&M') pursuant to ss. 233(1) and 277(5) of the Companies Act 1965 ('the Act'). By the acquiring order, it was incumbent upon the R&M, who was appointed by the secured creditor under the debenture created earlier by KCL, to hand over to the appellant, certain movable asset of KCL including its accounts, documents, ledgers, monies and other valuables. In the court below, the learned judge ruled that the obtaining of the acquiring order was legally unsustainable, and in the circumstances set aside the same. The appellant appealed and argued, *inter alia*, that the R&M, on the authority of *Kimlin Housing Development Sdn Bhd (receiver and manager appointed) (in liquidation) v. Bank Bumiputra (M) Bhd & Ors*, was duty bound to deliver to him the movable asset sought for. The issue that arose was whether, upon the proper reading of *Kimlin*, and ss. 233(1) and 277(5) herein, the appellant liquidator was *prima facie* entitled to the movable asset in question.

Held:
Per Mohd Saari Yusoff JCA

[1] The present case is concerned with an application by the liquidator for an acquiring order in respect of movable asset pursuant to s. 233(1) and s. 277(5) of the Act, whereas *Kimlin*'s concern was a statutory charge of land under the National Land Code. This apart, *Kimlin* did not at all

consider s. 277(5), but spoke rather of ss. 300 and 4(i)(b), the provisions which were qualified by s. 233(1) and s. 277(5). *Kimlin*, hence, is distinguishable from the present case. (pp 374 h & 375 a-c)

[2] A distinction has to be made between a receiver and manager who has been appointed by the secured creditor and one appointed by the company. In the case of one who was appointed by the secured creditor, as here, his primary duty was to the debenture holder and not to the company. (p 375 c-d)

[3] Assuming that KCL was not in liquidation, it ought to redeem the movable asset before R&M could be compelled to hand over the same. KCL, thus, is not *prima facie* entitled to the movable asset. Be that as it may, the liquidator's right could not be greater than that of KCL's. In the circumstances, R&M could not be compelled to hand over the movable asset to the appellant liquidator. KCL is only entitled to an equity of redemption. It follows that the liquidator is only entitled to exercise his right of redemption. (p 376 g)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dilantik sebagai penyelesai Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') ekoran penyelesaian syarikat berkenaan. Kemudiannya, perayu memohon dan memperoleh, *ex parte*, satu perintah perolehan terhadap penerima dan pengurus KCL ('R&M') di bawah ss. 233(1) dan 277(5) Akta Syarikat 1965 (Ákta'). Melalui perintah perolehan, R&M, yang dilantik oleh pemiutang bercagar di bawah debentur yang dimeterai sebelumnya oleh KCL, perlu menyerahkan kepada perayu harta boleh alih KCL, termasuk akaun-akaun, dokumen-dokumen, lejer, wang tunai dan lain-lain barangan berharga. Di mahkamah di bawah, hakim yang bijaksana mendapati bahawa pemberian perintah perolehan adalah silap di sisi undang-undang, dan dengan itu, mengetepikan perintah tersebut. Perayu merayu dan berhujah, antara lain, bahawa R&M, berdasarkan autoriti *Kimlin Housing Development Sdn Bhd (receiver and manager appointed) (in liquidation) v. Bank Bumiputra (M) Bhd & Ors*, adalah bertanggungan untuk menyerahkan aset boleh alih yang diminta olehnya. Isu yang berbangkit adalah sama ada, atas pembacaan yang betul *Kimlin*, serta ss. 233(1) dan 277(5) Akta, perayu penyelesai secara *prima facie* berhak mendapatkan harta boleh alih yang berkenaan.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Kes di sini adalah berkaitan dengan permohonan oleh penyelesai untuk perintah perolehan bagi mendapatkan aset boleh alih di bawah ss. 233(1) dan 277(5) Akta, sementara *Kimlin* melibatkan kes gadaian tanah di bawah Kanun Tanah Negara. Selain itu, *Kimlin* tidak langsung mempertimbang s. 277(5), sebaliknya memperkatakan tentang ss. 300 dan 4(i)(b), peruntukan mana adalah tertaktuk kepada syarat-syarat ss. 233(1) dan 277(5). Kes *Kimlin*, dengan itu, boleh dibezakan dari kes semasa.

[2] Harus ada perbezaan di antara seorang penerima dan pengurus yang dilantik oleh pemiutang bercagar dengan seorang yang dilantik oleh syarikat. Dalam kes penerima dan pengurus yang dilantik oleh pemiutang bercagar, sepertimana halnya di sini, tanggungjawab utamanya adalah kepada pemegang debentur dan bukannya kepada syarikat.

[3] Diandaikan KCL tidak berada dalam penyelesaian, ia harus menebus aset boleh alih di sini sebelum R&M boleh dipaksa untuk menyerahkannya. KCL, secara *prima facie*, dengan itu tidaklah berhak kepada aset boleh alih tersebut. Walau apapun, hak-hak seseorang penyelesai tidak boleh mengatasi hak-hak KCL sendiri. Oleh hal yang demikian, R&M tidak boleh dipaksa untuk menyerahkan aset boleh alih itu kepada penyelesai perayu. KCL hanya berhak kepada suatu ekuiti penebusan. Ianya mengikut bahawa penyelesai juga hanya boleh melaksanakan haknya untuk menebus.

Rayuan ditolak.]

Case(s) referred to:
Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd in Liquidation) [1995] 3 CLJ 316 SC ***(foll)***
Downsview Nominees Ltd & Ors v. First City Corp Ltd & Ors [1993] 3 All ER 626 ***(foll)***
Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(dist)***
Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 ***(foll)***
Re B Johnson & Co (Builders) Ltd [1955] 2 All ER 775 ***(foll)***
Re High Crest Motors Pte Ltd (in liquidation) [1978] 3 ACLR 888 ***(refd)***
Sowman & Ors v. David Samuel Trust Ltd & Anor [1978] 1 All ER 616 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 42
Companies Act 1965, ss. 4(i)(b), 108, 218, 233(1), 247(1), 277(5), 291(1), (2), 300

For the appellant - Shahul Hameed Amirudin (Woo Lai Mei); M/s Zul Rafique & Partners
For the 1st respondent - Mohamed Ariff Md Yusof (Aliza Hilyati Wan Haron); M/s Cheang & Ariff
For the 2nd respondent - Izabela DeSilva; M/s Iza Ng Yeoh & Kit

[Appeal from High Court, Kuala Lumpur; Companies Winding-Up No: D1-28-396-90]

Reported by WA Sharif

JUDGMENT

Mohd Saari Yusoff JCA:
On 30 September 1993, the appellant ("liquidator") obtained various *ex parte* orders which were subsequently set aside on 8 July 1994. Reliefs prayed for by the liquidator in the court below are as follows:

(1) (not applicable);

(2) commence legal proceedings against MBF Finance Berhad (hereinafter referred to as MBF) for the return of RM4 million and a further RM5.75 million;

(3) give notice to all creditors including secured creditors to prove their debts;

(4) acquire from the Receivers & Managers (hereinafter referred to as R&M) *inter alia*, the accounts, documents, ledgers & monies and other valuables ("the acquiring order");

(5) transfer Originating Summons No. D6-24-018-92 to this court.

Against the order of setting aside, the liquidator appeals.

Antecedent Facts
On 17 November 1982, Kosmopolitan Credit & Leasing Sdn Bhd ("KCL") created a debenture ("the debenture") in favour of a co-operative society known as Koperasi Serbaguna Kosmopolitan Berhad ("Koperasi").

Subsequently, the rights under the debenture were assigned by Koperasi to Kewangan Utama Malaysia Berhad ("KUMB") by virtue of a deed of assignment dated 16 November 1990.

On 8 February 1991, the 2nd respondent was appointed by the secured creditor as R&M pursuant to the terms of the debenture.

On 16 May 1991, on a petition presented by a creditor under s. 218 of the Companies Act 1965 ("the Act"), the High Court ordered the winding-up of KCL and appointed the appellant as the liquidator.

KUMB was subsequently acquired by the 1st respondent. By virtue of a vesting order dated 30 October 1991, all the rights and liabilities of KUMB became vested in the 1st respondent.

Subsequently, on 14 May 1992, the liquidator filed Originating Summons No. D6-24-98-92 seeking, *inter alia*, a declaration that the debenture was null and void. This matter has yet to be determined by the High Court.

The central issue for determination is whether the court has jurisdiction to grant the acquiring order.

Excerpts from the judgment of the Federal Court in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager (in liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274 at p. 302 reads:

> The position in this country is different. Because a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument is by definition (see s. 4(1)(b) of the Act) an officer of the corporation – and all officers of a corporation, whether past or present, are obliged under pain of prosecution under s. 300(1) of the Act, to deliver up to the liquidator appointed by the Court or as he direct
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> (i) all the moveable and immovable property of the corporation in his custody or under his control; or
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> (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s. 300(1)(b)(i) and (ii) – the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer.

For the liquidator, it is submitted that the present case is on all fours with *Kimlin*'s case. With greatest respect, we disagree. We are of the view that *Kimlin*'s case is distinguishable from the present case on the following grounds:

(i) The present case is concerned with application by the liquidator for an acquiring order in respect of movable asset pursuant to s. 233(1) and s. 277(5) of the Act; whereas, *Kimlin*'s case is concerned with statutory charge of land under NLC.

ii) In *Kimlin*'s case, it was an application for leave to sell lands which were subject to the charge, without taking proceedings under NLC to obtain judicial sale. In that case, the Federal Court held that *Sowman and Others v. David Samuel Trust Ltd. and Another* [1978] 1 All ER 616 had no application to charged land under NLC. But the Federal Court made no mention that *Sowman*'s case had no application to movable property.

(iii) Section 277(5) which is relevant to the present case was not considered in *Kimlin*'s case. Interpretation of s. 263(3) (in *pari materia* with our s. 277(5)) was discussed in *Re High Crest Motors Pte Ltd (in Liq)* [1978] 3 ACLR 888.

(iv) *Kimlin*'s case speaks about s. 300 which is a penal section and s. 4(i)(b). Our view is that the statutory provisions in the aforesaid section are qualified by s. 233(1) and s. 277(5). It is noted that under s. 300, R&M is required to hand over the asset of the company to the liquidator. In our view, distinction has to be made between R&M appointed by secured creditor and one appointed by the company. In the case of R&M appointed by secured creditor as here, his prime duty was to the debenture holder and not to the company as stated by Jenkin LJ in *Re B. Johnson & Co (Builders) Ltd* [1955] 2 All ER 775 at p. 790:

> . . .. the phrase 'manager of the company', *prima facie*, according to de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture-holder is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture-holder. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and management pending sale, and with full discretion as to the exercise and mode of exercising those powers. **The primary duty of the receiver is to the debenture-holder and not to the company.** He is receiver and manager of the property of the company for the debenture-holder, not manager of the company ... The whole purpose of the receiver and manager's appointment would be stultified if the company could claim that a receiver and manager owes it a duty comparable to the duty owed to a company by its own directors and managers ... He is under no obligations to carry on the company's

> business at the expense of the debenture-holder. Therefore he commits no breach of duty to the company to do so, even though his discontinuance of the business may be detrimental from the company's point of view. (emphasis added).

which passage was cited with approval in Privy Council's case of *Downsview Nominees Ltd & Ors v. First City Corp Ltd & Ors* [1993] 3 All ER 626.

With regard to s. 233(1) and s. 277(5), they state:

> S. 233(1). Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or **appears to be entitled**. (emphasis added).

> S. 277(5). The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is ***prima facie*** **entitled**. (emphasis added).

It is settled law that movable assets which form the subject matter of debenture are recognised as equitable charge. (See *Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd in Liquidation)* [1995] 3 CLJ 316; *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] I MLJ 266). Both cases were not considered in *Kimlin*'s case.

The question which arises is, is the liquidator *prima facie* entitled to the movable asset in the present case pursuant to s. 233(1) and s. 277(5)? In the light of *Director of Customs F.T.*'s case *(supra)* and *Mahadevan*'s case *(supra)*, our view is that the company is not *prima facie* entitled to the moveable asset.

It is common ground that the debenture in the present case was registered under s. 108 of the Companies Act 1965, meaning that the 1st respondent as debenture holder was a chargee of equitable charge. Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before R&M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, why should the liquidator's right be greater than that of KCL? In the light of our finding in para. 13 herein, R&M could not be compelled to hand over the movable asset to the liquidator. KCL is only entitled to equity of redemption and it follows, therefore, that the liquidator is only entitled to exercise his right of redemption.

On proof of debts, s. 247(1) of the Act empowers the court to fix dates by which creditors are to prove their debts, but by s. 252 this duty has been delegated to the liquidator. No leave is required to fix the dates or to send out notices to prove.

A secured creditor is not obliged to submit proof of debt and can rely on his security by virtue of s. 291(1) and (2) of the Companies Act 1965 and Schedule C (s. 42) of the Bankruptcy Act 1967. The combined effect of the above provisions is that a secured creditor may submit proof of debt and if he does, he will be entitled to a dividend in respect of the unsecured portion: (see items 9, 10 and 11 of Schedule C). If the secured creditor does not submit proof of debt then pursuant to item 16 of Schedule C of the Bankruptcy Act 1969 the secured creditor shall be excluded from participating in a dividend.

The Federal Court in *Director of Customs Federal Territory*'s case *(supra)* considered the position of a secured creditor in a winding-up and concluded that the secured creditor stands outside the liquidation but may come in under the liquidation. There is clearly no mandatory requirement under s. 291(1) and (2) for a secured creditor to come under a winding-up and prove his debt.

In conclusion, for reasons given herein, our finding on the aforesaid issue is in the negative. Thus, we agree with the finding of the learned judge in the court below but for different reasons. Accordingly, we dismiss the appeal with cost here and the court below. Further, as agreed by both respondents, we order that cost to the respondents to be paid out of the asset of the company. Deposit made by the appellant to be paid to the respondents towards the account of taxed cost.